Filed 4/26/10 P. v. Vizcarra CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT RENE VIZCARRA,<br><br>Defendant and Appellant. | B218398<br><br>(Los Angeles County<br>Super. Ct. No. KA087178) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas W. Sortino and Charles E. Horan, Judges; Wade Olson, Temporary Judge (pursuant to Cal. Const., art. VI, § 21). Reversed.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, David C. Cook and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Robert Rene Vizcarra appeals from the judgment entered following his guilty plea and conviction of possessing a controlled substance. Defendant contends the trial court erred by denying his suppression motion. We agree and reverse his conviction.

**BACKGROUND**

Defendant was arrested for possession of methamphetamine and a smoking device following a warrantless search of his car. His motion to suppress the seized evidence was heard at the same time as the preliminary hearing.

Glendora Police Officer Jacob Swann testified at the preliminary hearing that on April 21, 2009, at about 10:32 p.m. he was standing outside his patrol car in a restaurant parking lot. He heard loud voices emanating from a moving car about 50 to 60 yards away. As the car passed, Swann heard the female passenger shout, "'Fuck you,'" and defendant, who was driving, shout, "'No, fuck you.'" It sounded like "a very heated argument."

Swann jumped into his patrol car because he "thought there was a pending argument in the car and probably a pending physical fight." Swann explained that his expectation of a physical fight was based upon his experience as a police officer: "We always get calls at the time of pending arguments where words are exchanged and in a heated nature that turn physical and this seemed to be that exact kind of case." Swann caught up to defendant's car as it left the parking lot and stopped it as soon as it turned onto the public street.

Swann directed defendant to remain in the car and ordered the passenger, whose name was Andrea Desy, to sit on the curb near Swann's patrol car. Swann asked Desy what was going on in the car, and she said that she and her boyfriend "were having an argument about her having to get her way all the time." Desy denied that the argument was physical. After three or four minutes, a backup officer arrived and Swann directed defendant to get out of the car. Swann patted defendant down to check for weapons, though nothing led Swann to believe defendant might have a weapon. Swann made

defendant sit on the curb. Defendant said he was arguing with Desy "about her getting her way all the time," and stated that the argument had not become physical.

Swann removed defendant's license from his wallet and asked defendant if he was on probation or parole. Defendant said he was "on PC-1000 so he didn't know if he was on probation or parole." (Penal Code section 1000 et seq. pertains to a deferred entry of judgment program for selected controlled substance charges.) Swann asked defendant when he had most recently used any drugs, and defendant said it had been months. Defendant's speech "seemed slightly rapid." Swann looked at defendant's pupils and noticed they were dilated and slow to react. Swann took defendant's pulse, which was faster than 100 beats per minute. Swann told defendant that he could tell defendant was under the influence of a controlled substance. Defendant admitted he had used methamphetamine about two days before. Swann asked defendant if there was "anything illegal in the car." Defendant said he wanted a lawyer. Swann told him he was not under arrest and again asked whether there was "anything illegal in the car." Defendant said he did not want to go to jail. Swann told defendant that "he was not necessarily going to jail" and asked him what was in the car. Defendant told Swann that there was a baggie of methamphetamine, a smoking pipe, and a digital scale in the driver's door. Swann searched the car and recovered the items defendant mentioned from the driver's door pocket.

The parties stipulated that the baggie recovered from defendant's car contained methamphetamine.

The court denied the suppression motion, stating that, in light of Swann's experience in domestic violence situations where "angry words have escalated into violence," it was reasonable for Swann to stop defendant's car: "I think he had reasonable suspicion to investigate the possibility of a domestic violence offense be [*sic*] to occur that's based on the words spoken; the fact it's a male and female in the car; the fact it's late at night and the fact that it was so loud he could hear it at yards." The court further concluded that it was reasonable to separate the parties, call for backup, and ask

Desy and defendant what was going on. The court found that it was four to five minutes from the time Swann stopped the car until he ordered defendant out of the car after the backup officer arrived. The court also found that Swann's observations of defendant while asking him about the argument and defendant's admission regarding Penal Code section 1000 supported a continued detention and an "advanced investigation" to determine whether defendant was under the influence of a controlled substance. Finally, defendant's admission that there was a controlled substance provided probable cause to search the car. Apart from the pat search, the court found that the "entire thing is valid under the 4th Amendment."

Defendant was held to answer and renewed his motion in superior court via a Penal Code section 995 motion to dismiss. The court denied the motion, and defendant accepted a plea agreement and pleaded guilty to possession of methamphetamine. The charge of possession of a smoking device was dismissed. The court placed defendant on probation under Proposition 36.

**DISCUSSION**

In ruling upon a motion to suppress, the trial court judges the credibility of the witnesses, resolves any conflicts in the testimony, weighs the evidence, and draws factual inferences. We will uphold the trial court's findings, express or implied, on such matters if they are supported by substantial evidence, but we independently review whether the search or seizure was reasonable under the Fourth Amendment. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Where, as here, a motion to suppress was submitted to the superior court on the preliminary hearing transcript, we disregard the superior court's findings and review the determination of the magistrate who originally ruled on the motion. (*People v. Thompson* (1990) 221 Cal.App.3d 923, 940.)

Defendant contends that his detention by Swann was unconstitutional because it was based upon a combination of hunch and curiosity, not reasonable suspicion. He

further argues that the subsequent search was also unconstitutional because it was based solely upon matters Swann observed and learned during the unlawful detention.

The Attorney General argues that the initial traffic stop was justified by Swann's concern that the argument between Desy and defendant would result in physical violence. Thereafter, Swann's observations of defendant led him to reasonably suspect that defendant was under the influence of narcotics, and Swann's admission that he had methamphetamine in the car provided probable cause to support the search of the car.

The Attorney General relies upon *People v. Madrid* (2008) 168 Cal.App.4th 1050 (*Madrid*), in which the court held that the community caretaking exception to the warrant requirement recognized in Justice Brown's plurality opinion in *People v. Ray* (1999) 21 Cal.4th 464, may, in appropriate cases, apply to a traffic stop. The community caretaking exception stems from the expanded functions of modern police forces in assuring the well-being of the public by, for example, assisting persons who are in danger of physical harm or who cannot care for themselves. (*Ray*, at pp. 471–472.) "The appropriate standard under the community caretaking exception is one of reasonableness: Given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions? Which is not to say that every open door—even in an urban environment—will justify a warrantless entry to conduct further inquiry. Rather, as in other contexts, 'in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or "hunches," but to the reasonable inferences which he is entitled to draw from the facts in the light of his experience; in other words, he must be able to point to specific and articulable facts from which he concluded that his action was necessary.'" (*Id.* at pp. 476–477.)

In *Madrid*, *supra*, 168 Cal.App.4th 1050, the court accepted the possibility that the community caretaking exception might justify stopping a vehicle, but found that "given the known facts, a reasonable officer would not have perceived a need to stop [Madrid's] vehicle to discharge his community caretaking functions." (*Id.* at pp. 1058, 1060.) An

officer stopped Madrid's truck in a shopping center parking lot because Madrid's passenger was perspiring and had exhibited an unsteady gait. The officer thought the passenger might be under the influence of alcohol or drugs, have a medical problem, or be a victim of assault. After the officer approached the truck, he noticed that the passenger was "'nodding off'" and had dilated pupils. (*Id.* at p. 1053.) The officer's inquiry about drugs led to admissions and the recovery of contraband. (*Id.* at pp. 1053–1054.) The appellate court noted that the passenger exhibited a low level of distress, neither Madrid nor the passenger indicated a need for help, nothing about the passenger's circumstances suggested he required additional aid, and Madrid was available to assist the passenger, if necessary. (*Id.* at p. 1060.) The court rejected a possible inference by the officer that the passenger may have been suffering from a drug overdose as "unreasonably speculative." (*Ibid.*)

Assuming that the initial stop of defendant's car was justified under the community caretaking exception, the detention should have ended as soon as Swann learned from Desy that the argument did not involve physical contact. If Swann wanted to verify that information with defendant, he could have just asked defendant while defendant remained seated in his car. Swann had no justification for forcing defendant to get out of the car and sit on the curb, pat-searching him, and questioning him, which led to the discovery of the contraband. Swann had not observed any act of physical violence or threatened physical violence, such as raising a fist or moving a hand toward the other person, nor had he observed any act suggesting defense against physical violence, such as raising hands defensively or turning away to avoid a blow to the face. Swann had not heard Desy or defendant make any threats. Swann had not been dispatched to the area or heard a dispatch reporting domestic violence between a couple that might have been Desy and defendant. Swann had not observed any injury to either occupant. (Cf. *People v. Frye* (1998) 18 Cal.4th 894, 989–990, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [exigent circumstances supported warrantless entry of home where officer responded to domestic violence report and woman with bruised,

swollen face opened door and pointed to Frye as person who injured her].) Swann had no knowledge of any history of violent behavior by either Desy or defendant and had not seen either one of them with a weapon. Nor had Swann observed either Desy or defendant exhibiting any sign of distress, as opposed to anger. For example, neither Desy nor defendant waved at Swann, appeared to shout "Help," or appeared to try to get out of the car. In short, the community caretaking exception does not justify the extended detention here. Any justification for the detention evaporated once Swann learned from Desy and defendant that they were simply arguing, without engaging in any physical violence.

"[R]easonableness 'depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers,"' [citations]." (*Maryland v. Wilson* (1997) 519 U.S. 408, 411–412 [117 S.Ct. 882].) "In engaging in this weighing process, courts must act as vigilant gatekeepers to ensure that the community caretaking exception does not consume the warrant requirement." (*Madrid*, *supra*, 168 Cal.App.4th at p. 1058.) Public interest is not served by stopping a lawfully driven car because an argument between occupants of the car *might* lead to physical violence and detaining its occupants beyond the time it took to investigate the threat of domestic violence. A contrary holding would be tantamount to creating a "man and woman arguing in a car" exception to the warrant requirement. Swann detained defendant in violation of the Fourth Amendment, and the trial court should have suppressed the evidence seized as a result of this illegal detention.

We disregard the Attorney General's contention that the argument "could have impaired [defendant's] driving ability." This claim is entirely speculative and unsupported by Swann's testimony.

## DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.